IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

DOUG LAIR, STEVE DOGIAKOS, AMERICAN TRADITION PARTNERSHIP, AMERICAN TRADITION PARTNERSHIP PAC, MONTANA RIGHT TO LIFE ASSOCIATION PAC, SWEET GRASS COUNCIL FOR COMMUNITY INTEGRITY, LAKE COUNTY REPUBLICAN CENTRAL COMMITTEE, BEAVERHEAD COUNTY REPUBLICAN CENTRAL COMMITTEE, JAKE OIL LLC, JL OIL LLC, CHAMPION PAINTING INC, and JOHN MILANOVICH, Plaintiffs, vs. JAMES MURRY, in his official capacity as Commissioner of Political Practices; STEVE BULLOCK, in his official capacity as Attorney General of the State of Montana; and LEO GALLAGHER, in his official capacity as Lewis and Clark County Attorney; Defendants.	CV 12-12-H-CCL FINDINGS OF FACT CONCLUSIONS OF LAW OPINION AND ORDER

The remainder of this case—the constitutionality of Montana's contribution limits in Montana Code Annotated § 13–37–216—came before the Court in a bench trial held from September 12, 2012, to September 14, 2012. The plaintiffs were represented by James Bopp, Jr., and the defendants were represented by Michael Black and Andrew Huff. The plaintiffs argue that the contribution limits are unconstitutional under the First Amendment. For the reasons below, the Court declares those limits unconstitutional and permanently enjoins the defendants from enforcing them.

JURISDICTION, VENUE, AND PARTIES

The plaintiffs seek injunctive and declaratory relief under 42 U.S.C. §1983. Jurisdiction is proper under 28 U.S.C. §§ 1331 and 1343(a). Venue is proper under 28 U.S.C. § 1391(b).

Plaintiffs American Tradition Partnership PAC, Montana Right to Life Association PAC, Lake County Republican Central Committee, and Beaverhead County Republican Central Committee each constitute a "political committee" as defined by Mont. Code Ann. § 13–1–101(22). Plaintiffs Lake County Republican Central Committee and Beaverhead County Republican Central Committee further qualify as "political party organizations" within the meaning of Mont. Code Ann. § 13–37–216(3). Plaintiffs Doug Lair and Steve Dogiakos both want to make

contributions above the contribution limits to candidates for various Montana elected offices. They would do so but for Montana's contribution limits. Plaintiff John Milanovich has run for State House in the past and intends to run again in the future.

As Commissioner of Political Practices, Defendant Jim Murry has authority to investigate violations of, enforce the provisions of, and hire attorneys to prosecute violations of, Montana Code Chapters 35 and 37 and the rules adopted to carry out these provisions. The Commissioner acts under color of state law and is sued in his official capacity. As Montana Attorney General, Defendant Steve Bullock has power to investigate and prosecute violations of Montana Code Chapters 35 and 37 by and through the county attorneys under his supervision. The Attorney General acts under color of state law and is sued in his official capacity. As Lewis and Clark County Attorney, Defendant Leo Gallagher has power to investigate and prosecute violations of Montana Code Chapters 35 and 37. The County Attorney acts under color of state law and is sued in his official capacity.

BACKGROUND

The plaintiffs filed this lawsuit in the Billings Division for the District of Montana on September 6, 2011. They claim that several of Montana's campaign

finance and election laws are unconstitutional under the First Amendment. The statutes that they challenge are:

> Montana Code Annotated § 13–35–225(3)(a), which requires authors of political election materials to disclose another candidate's voting record;
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> Montana Code Annotated § 13–37–131, which makes it unlawful for a person to misrepresent a candidate's public voting record or any other matter relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether it is false;
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> Montana Code Annotated § 13–37–216(1), (5), which limits contributions that individuals and political committees may make to candidates;
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> Montana Code Annotated § 13–37–216(3), (5), which imposes an aggregate contribution limit on all political parties; and
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> Montana Code Annotated § 13–35–227, which prevents corporations from making either direct contributions to candidates or independent expenditures on behalf of a candidate.

The plaintiffs moved for a preliminary injunction on September 7, 2011, seeking to enjoin the defendants from enforcing each of these statutes. Before any action was taken on the motion, the defendants moved to change venue that Court granted that motion on January 31, 2012, and the case was transferred to the Helena Division assigned by lot to the undersigned.

On February 16, 2012, the Court held a hearing on the motion for a preliminary injunction and enjoined enforcement of Montana's vote-reporting

requirement and political-civil libel statute (*See* doc. 66); Mont. Code Ann. §§ 13–35–225(3)(a), 13–37–131. The Court denied the motion as to the remaining statutes. (*Id.*)

The Court issued its scheduling order on March 9, 2012. The parties agreed that all of the issues regarding the contribution limits in Montana Code Annotated § 13–37–216(1), (3), and (5) would be resolved through a bench trial and that all other matters would be adjudicated by summary judgment. (*See* doc. 73.) The Court and the parties all agreed to place this matter on an expedited schedule so that it will be resolved prior to this year's election.

The parties cross-moved for summary judgment, and the Court held a hearing on May 12, 2012. The Court granted both motions in part and denied them in part. (*See* doc. 90.) The Court permanently enjoined Montana's vote-reporting requirement, political-civil libel statute, and ban on corporate contributions to political committees that the committees use for independent expenditures. *See* Mont. Code Ann. §§ 13–35–225(3)(a), 13–37–131,13–35–227. The Court, however, concluded that Montana's ban on direct and indirect corporate contributions to candidates and political parties is constitutional. *Id.* at § 13–35–227. The parties cross-appealed that order but then voluntarily dismissed the appeals on July 23, 2012.

On June 20, 2012, the defendants—without leave of the Court—moved for summary judgment on the plaintiffs' claims concerning Montana's contribution limits. The Court denied the motion because, as explained in the scheduling order, the parties agreed that those claims would be resolved only through a bench trial. Moreover, the defendants' motion was untimely.

The Court held a bench trial from September 12, 2012, to September 14, 2012, in order to resolve the plaintiffs' claims related to Montana's campaign contribution limits in Montana Code Annotated § 13–37–216(1), (3), and (5). At the final pretrial conference immediately preceding the trial, the plaintiffs renewed their motion for summary judgment, and the Court took that motion under advisement.

TESTIMONY AT THE BENCH TRIAL

James Bopp, Jr. argued the plaintiffs' case.[1] Michael Black and Andrew Huff argued the defendants' case. Having considered the testimony of both the plaintiffs' and the defendants' witnesses, the Court finds the plaintiffs' witnesses more persuasive and that the facts weigh in favor of the plaintiffs.

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[1] James E. Brown initially appeared on behalf of the plaintiffs, but he was called as the plaintiffs' first witness and was therefore barred from subsequently arguing the plaintiffs' case at the trial. *See* Mont. R. Prof. Conduct 3.7.

I. Plaintiffs' expert witness: Clark Bensen

The plaintiffs presented an expert, Clark Bensen, who analyzed the effect of Montana's contribution limits. Bensen analyzed "competitive" races in Montana, which he defined as elections where the margin of victory was 10% or less. Bensen studied 112 campaigns. Those campaigns were for either Public Service Commission offices or the Legislature. Most of these elections were for the 2008 or 2010 elections, but there were some for the 2004 and 2006 elections. Bensen considered only "itemized contributions," which are contributions over $35.

Bensen concluded that these campaigns relied substantially on "maxed-out donors" for campaign revenue. Bensen calculated that, on average, 29% of the contributors in the campaigns had donated to the maximum level (26% for Democrats, and 34% for Republicans). Roughly 37% of the contributors were at a "near-max" level. On average, the campaigns that Bensen analyzed receive 86% of their itemized contributions from individuals (generating 74% of their overall revenue), 9% of their itemized contributions from political committees (generating 10% of their overall revenue), and 2% of their itemized contributions from political parties (generating 6% of their overall revenue). Many campaigns are self-financed to some degree.

Bensen found that the reliance on maxed-out donors is substantial: On average, 44% of the aggregate amount of funds raised by itemized contributions

from individuals and political committees are generated by maxed-out donors. This percentage rises to 54% when considering "near-max" donors.

Of the 112 campaigns at issue (excepting one candidate from the Constitution Party), Bensen determined that 40% of the candidates received the maximum aggregate contribution limit from their political parties.

Of particular note and relevance here, the average campaign spends more than it raises, by about 7%. Bensen therefore concluded that campaigns struggle "to meet their perceived needs for operations and communication with voters."

II. Testimony from other witnesses for the plaintiffs

The Lake County Republican Central Committee ("Lake County Republicans") is the local Republican Party for Lake County. It has a history of making contributions to Republican candidates, including in the last election. Darren Breckenridge testified on behalf of the Lake County Republicans.

The Lake County Republicans plans to make contributions to candidates in the 2012 election. Specific planned contributions include a contribution to Joe Reed, who will be running for election in House District 15, and a contribution to whichever Republican runs for election in Senate District 6. It plans to contribute up to the limits allowed by law. The Lake County Republicans wants to make its planned contributions, including a $2,000 contribution to Reed, even if other political parties also make contributions to their chosen candidates. If other

political parties contribute to its chosen candidates, the Lake County Republicans would make its planned contributions, but for the aggregate limits imposed by Montana Code Annotated § 13–37–216(3), (5), and the penalties imposed on those who violate them. Montana's law, however, limits its contributions to $800 for State House candidates. The Lake County Republicans would have made a contribution of more than $400 to House District candidate Jenna Taylor except she had already received $400 and so could only legally accept $400 more.

The Beaverhead County Republican Central Committee ("Beaverhead County Republicans") is the local Republican Party for Beaverhead County. It has a history of making contributions to Republican candidates, including in the last election. James E. Brown testified at trial on behalf of the Beaverhead County Republicans.[2] The Beaverhead County Republicans plans to make contributions to candidates in the 2012 election. The Beaverhead County Republicans plans to make a contribution to Joe Reed, who will be running for election in House District 15, a contribution to Debby Barrett, who will be running for re-election in Senate District 36, and a contribution to Rick Hill. It plans to contribute up to the limits allowed by law.

The Beaverhead County Republicans wants to make its planned contributions, even if other political parties also make contributions to its chosen

[2] *See* note 1, *supra.*

candidates. If other political parties contribute to its chosen candidates, the Beaverhead County Republicans would still make its planned contributions, but for the aggregate limits imposed by Montana Code Annotated § 13–37–216(3), (5), and the penalties imposed on those who violate them. The Beaverhead County Republicans attempted to make contributions to several candidates for State House and State Senate during the 2010 election. Because of the aggregate party contribution limits, five of those candidates were forced to return the Beaverhead County Republicans' contributions.

Plaintiff Doug Lair is a Big Timber area rancher and investor. Plaintiff Steve Dogiakos is a political activist and small businessman who owns a company offering web design services. Both Lair and Dogiakos have previously made contributions to candidates running for office in Montana. Lair and Dogiakos intend to make contributions to candidates running for office in 2012.

Lair has already contributed the maximum to candidates Ken Miller, Debra Lamm, Bob Faw, and Tim Fox in the 2012 primary and plans to contribute the maximum amount to Republican candidates like Ed Walker, Dan Kennedy, Rick Hill, and Dan Skattum. He would give more if allowed by law.

Dogiakos intends to make contributions to Republican candidates for the Public Service Commission and the State House. Dogiakos would give $500 to Christy Clark, 2012 candidate for the State House from House District 17; $1,000

to Bob Lake, a Public Service Commissioner candidate; $500 to Wylie Galt, a candidate for House District 83; and Liz Bangerter, a candidate for House District 80, except he is prohibited from giving that much by law.

Plaintiff John Milanovich resides in Bozeman. Milanovich ran unsuccessfully for the State House in 2008. He appeared on the ballot for the Republican primary in 2010, but decided to endorse one of his primary opponents in that race. Milanovich intended to run for the State House again in 2012 from House District 69, but after filing his candidacy, withdrew due to growing obligations with his growing business. Milanovich filed his "Statement of Candidate" Form C-1 with the Office of the Commissioner of Montana Political Practices. Form C-1 must be filed within five days after a candidate for office receives or spends money, appoints a campaign treasurer, or files for office, whichever occurs first. The statutory authority for Form C-1 is contained in Montana Code Annotated §§ 13–37–201, 13–37–202, 13–37–205. Because Milanovich filed his Form C-1, he was allowed to solicit and accept contributions for his campaign. Milanovich began doing so.

Milanovich would have solicited and accepted contributions above the $160 contribution limit if the law did not prohibit and penalize him for doing so. Moreover, Milanovich would have solicited and accepted contributions from the Montana Republican Party above the $800 contribution limit. He also would have

solicited and accepted contributions from various county Republican parties above the $800 contribution limit if the law had permitted him to do so.

Richard Mike Miller was first elected as the House District 84 Representative in 2008. Representative Miller is a Republican. He ran successfully in 2010 and is now a candidate for the same seat in the 2012 election. House District 84 is primarily rural and is approximately 2,500 square miles in size. Approximately 9,500 people live in Representative Miller's House District 84.

Representative Miller ran an opposed campaign in 2008 and 2010, and his current campaign is opposed. In the 2008 election, Representative Miller raised between $8,000 and $9,000 for his campaign. In 2010, he raised between $5,000 and $6,000. In the current election, Representative Miller has raised approximately $3,500. Between 5% and 10% of Representative Miller's donors have made donations up to the contribution limits.

In 2008, Representative Miller received the contribution limit from political committees, but he did not receive the contribution limit from his political party. Since Representative Miller received the maximum aggregate contribution from political committees in 2008, he was not able to accept additional money from political committees after reaching that limit and he was not able to identify additional political committees as contributors. In 2010, Representative Miller came within $10 of reaching the aggregate contribution limit for political

committees and then stopped accepting contributions from political committees. For his 2012 campaign, Representative Miller has received the aggregate contribution limit for political committees. During his 2008, 2010, and 2012 campaigns, Representative Miller received contributions from political committees after reaching the aggregate limit, and he has been forced to return those contributions.

A significant aspect of Representative Miller's campaign involves mailing information to potential voters. He believes that roughly $12,000 would be necessary to effectively reach potential voters through mailings. Representative Miller testified that the cost of running a campaign has increased while he has been in office. For example, in 2008, 1,000 pencils cost Representative Miller $170. They now cost $195, a 15% increase. In 2008, 100 yard signs cost $320. They are now $345, an 8% increase. Postage has increased from 41 to 45 cents, a 10% increase. Perhaps most significantly, Representative Miller testified that his cost of gasoline has increased from $2.25 a gallon to $3.75 a gallon, a 67% increase. Representative Miller testified that these are essential items that he needs to run a campaign. Representative Miller testified that, but for Montana's contribution limits, he believes he could raise the necessary funds to run an effective campaign.

III. Defendants' expert witness: Edwin Bender

The defendants presented an expert, Edwin Bender, who analyzed the effects of Montana's contribution limits. Bender's analysis, unlike Bensen's, is based on all campaigns, not just "competitive" campaigns. And, unlike Bensen, he analyzed campaigns for all statewide races, legislative races, and the gubernatorial race.

Bender's analysis shows that, between 2004 and 2010, legislative candidates raised between 56% and 70% of their itemized campaign funds from individuals, between 9% and 11% from political committees, between 3% and 4% from political parties, and between 7% and 11% from unitemized contributions (contributions less than $35). Between 11% and 18% of the contributions were self-financed contributions. For statewide campaigns, those statistics are: between 52% and 71% from individual contributors, between 0% and 3% from political committees, between 2% and 4% from political parties, and between 7% and 9% from unitemized contributions. Between 17% and 38% of the contributions were self-financed contributions. For the 2004 and 2008 gubernatorial campaigns, those statistics are: between 89% and 96% from individuals, 0% from political committees, between 0% and 2% from political parties, and 1% from unitemized contributions. Between 1% and 10% of the contributions were self-financed contributions.

Bender also analyzed the number of individuals and political committees that donated at the maximum levels for the 2004 to 2010 elections. In State House races where the primary was not contested, between 15% and 29% of individual contributors donated at the maximum level. Between 45% and 49% of the political committees donated at the maximum level. In State Senate races, where the primary was not contested, Bender found that between 18% and 33% of individual contributors donated at the maximum level. Between 48% and 64% of the political committees donated at the maximum level. In statewide office races, where the primary was not contested, Bender found that between 0% and 19% of individual contributors donated at the maximum level. Between 0% and 58% of the political committees donated at the maximum level. In the 2004 and 2008 gubernatorial races, 2% of the individual contributors donated at the maximum level. Virtually none of the political committees made maximum contributions. For each of these campaigns, when the primary was contested, a much smaller percentage of individuals and political committees made maximum contributions during both the primary and general elections.

From 2000 to 2010, Montana candidates received an average of 3.8% of their contributions from political parties. Challengers generally received more money from political parties than incumbents. In legislative races between 2004 and 2010, where the primary was not contested, Bender found that between 22%

and 32% of the candidates accepted the maximum aggregate contribution from political parties. In statewide races between 2004 and 2010, where the primary was not contested, between 0% and 18% of the candidates accepted the maximum aggregate contribution from political parties. In the 2004 and 2008 gubernatorial races, none of the candidates received the maximum aggregate contribution from political parties. Again, for each of these campaigns, when the primary was contested, a much smaller percentage of individuals and political committees made maximum contributions during both the primary and general elections

IV. Testimony from other witnesses for the defendants

Defendant Jim Murry is the Commissioner of Political Practices. Commissioner Murry testified that "effective" campaigns require more than monetary contributions. They require volunteers to help deliver a candidate's message to the voters.

On May 15, 2012, the Deputy Commissioner of Political Practices, Jay Dufrechou, issued a Commissioner's Opinion stating that services provided to a campaign by volunteers do not constitute contributions. *See In re Bullock*, (Commr. of Politcal Pracs. May 15, 2012) (Ex. 8). Political parties and political action committees, therefore, may provide unlimited volunteer services to candidates.

Mary Ellen Baker is the Program Supervisor for the Office of Political

Practices. She has a number of responsibilities with the Office, including ensuring that candidates comply with Montana's laws and regulations. According to Baker, many candidates utilize volunteer services that are provided by political parties.

Baker testified that there are 141 or 142 current and active political committees registered in the State of Montana. There are approximately 123 political party committees in the State, approximately 50 of which are Republican party committees. Baker testified that she believed a contribution of up to $1,000 would not have a corruptive effect.

ANALYSIS

I. Montana's contribution limits

Montana Code Annotated § 13–37–216(1), (3), (5) provides:

> (1)(a) Subject to adjustment as provided for in subsection (4),[3] aggregate contributions for each election in a campaign by a political committee or by an individual, other than the candidate, to a candidate are limited as follows:

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[3] Subsection 4 provides:

> (a) The commissioner shall adjust the limitations in subsections (1) and (3) by multiplying each limit by an inflation factor, which is determined by dividing the consumer price index for June of the year prior to the year in which a general election is held by the consumer price index for June 2002.
>
> (b) The resulting figure must be rounded up or down to the nearest:
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> (i) $10 increment for the limits established in subsection (1); and
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> (ii) $50 increment for the limits established in subsection (3).
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> (c) The commissioner shall publish the revised limitations as a rule.

(i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed $500;

(ii) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $250;

(iii) for a candidate for any other public office, not to exceed $130.

(b) A contribution to a candidate includes contributions made to the candidate's committee and to any political committee organized on the candidate's behalf.

. . .

(3) All political committees except those of political party organizations are subject to the provisions of subsections (1) and (2). For purposes of this subsection, "political party organization" means any political organization that was represented on the official ballot at the most recent gubernatorial election. Political party organizations may form political committees that are subject to the following aggregate limitations, adjusted as provided for in subsection (4), from all political party committees:

(a) for candidates filed jointly for the offices of governor and lieutenant governor, not to exceed $18,000;

(b) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $6,500;

© for a candidate for public service commissioner, not to exceed $2,000;

(d) for a candidate for the state senate, not to exceed $1,050;

(e) for a candidate for any other public office, not to exceed $650.

. . .

> (5) A candidate may not accept any contributions, including in-kind contributions, in excess of the limits in this section.

Montana law also limits the total aggregate contributions that state legislative candidates may receive from political committees:

> A candidate for the state senate may receive no more than $2,150 in total combined monetary contributions from all political committees contributing to the candidate's campaign, and a candidate for the state house of representatives may receive no more than $1,300 in total combined monetary contributions from all political committees contributing to the candidate's campaign. The limitations in this section must be multiplied by an inflation factor, which is determined by dividing the consumer price index for June of the year prior to the year in which a general election is held by the consumer price index for June 2003. The resulting figure must be rounded up or down to the nearest $50 increment. The commissioner shall publish the revised limitations as a rule. In-kind contributions must be included in computing these limitation totals. The limitation provided in this section does not apply to contributions made by a political party eligible for a primary election under 13-10-601.

Mont. Code Ann. § 13–37–218.

The aggregate limit in Montana Code Annotated § 13–37–218 applies only to state legislative campaigns. *Id.* The limits do not apply to other offices. So, for example, candidates in the governor election may accept unlimited total contributions from political committees, but those committees are limited to contributing $500 apiece (adjusted for inflation). *See* Mont. Code Ann § 13–37–216(1)(a)(i). The plaintiffs do not challenge the constitutionality of

Montana Code Annotated § 13–37–218. The Court, therefore, makes no determination as to the constitutionality of this statute, and this decision does not impact the defendants' ability to enforce Montana Code Annotated § 13–37–218.

After adjusting the limits above for inflation, *see* Mont. Code Ann. §§ 13–37–216(5), 13–37–218, Montana's contribution limits are:

Contribution limits for individuals and political committees
(Admin. R. Mont. 44.10.338(1))

Office	Contribution limit
Governor	$630
Other statewide offices	$310
All other public offices	$160

Aggregate contribution limits for political parties
(Admin. R. Mont. 44.10.338(2))

Office	Contribution limit
Governor	$22,600
Other statewide offices	$8,150
Public Service Commission	$3,260
Senate	$1,300
All other public offices	$800

Aggregate contribution limits for political committees
(Admin. R. Mont. 44.10.331(1))

Office	Contribution limit
Senate	$2,650
House Representative	$1,600

II. Standard of review

While laws limiting campaign expenditures are subject to strict scrutiny, restrictions on contributions are subject to a "lesser standard." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1117 (9th Cir. 2011) (citing *Buckley v. Valeo*, 424 U.S. 1, 20 (1976)). "Contribution limits need only be 'closely drawn' to match a sufficiently important interest to survive a constitutional challenge." *Id.* (quoting *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (plurality opinion)). Under this standard, a contribution limit is constitutional as long as the limit is "closely drawn" to match "a sufficiently important interest." *See id.*; *Nixon v. Shrink Mo. Govt. PAC*, 528 U.S. 377, 387–88 (2000); *Buckley*, 424 U.S. at 25.

The Ninth Circuit held that, after *Buckley* and *Shrink Missouri*, state campaign contribution limits will be upheld if:

> (1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and
>
> (2) if the limits are "closely drawn"—i.e., if they (a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign.

Mont. Right to Life Assn. v. Eddleman, 343 F.3d 1085, 1092 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 47 (2004).

Similarly, the U.S. Supreme Court later explained in *Randall*:

> Following *Buckley*, we must determine whether . . . contribution limits prevent candidates from "amassing the resources necessary for effective [campaign] advocacy"; whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny.

548 U.S. at 248. (quoting *Buckley*, 424 U.S. at 21).

As the *Randall* plurality noted, courts have "no scalpel to probe" each possible contribution level. 548 U.S. at 249. Courts cannot "determine with any degree of exactitude the precise restriction necessary to carry out [a] statute's legitimate objectives." *Id.* That task is better left to state legislatures. *Id.* That being said, there are lower bounds to contribution limits. *Id.* at 248.

The *Randall* plurality articulated a two-step framework for analyzing the question of whether a contribution limit is "closely drawn." First, a court must look for "danger signs" as to whether the contribution limit at issue is too low. 548 U.S. at 249–53. A court, for instance, should compare the limit at issue with limits that have been previously upheld or declared constitutional and compare the limit to other limits across the country. *Id.* If "danger signs" are present, then a court must move to the second step—"examin[ing] the record independently and

carefully . . . determin[ing] whether [the] contribution limits are 'closely drawn' to match the State's interest." *Id.* at 253.

In *Randall*, the plurality discussed five factors when it examined the record to determine whether the contribution limit in that case was closely drawn:

1. whether the record suggests that the contribution limit "will significantly restrict the amount of funding available for challengers to run competitive campaigns," *id.* at 253–56;

2. whether political parties must abide by the same limits that apply to other contributors, *id.* at 256–59;

3. whether volunteer services are treated as contributions for purposes of the contribution limit, *id.* at 259–60;

4. whether the contribution limit is adjusted for inflation, *id.* at 260; and

5. if the contribution limit is "so low or so restrictive to bring about . . . serious associational and expressive problems," whether there is "any special justification" that warrants such a limit, *id.* at 261–62.

Nothing in the *Randall* opinion suggests that this list of five factors is exhaustive or that each factor must weigh against a limit in order for it to be unconstitutional.

III. *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003)

This case is not the first time that a court has examined Montana's contribution limits. In 2000, the Billings Division for the District of Montana held a four-day bench trial to determine the constitutionality of the same statutes. *See*

Mont. Right to Life Assn. v. Eddleman, CV 96–165–BLG–JDS (D. Mont. Sept. 19, 2000) (Ex. 11). The Court upheld the limits, and the Ninth Circuit affirmed that decision in 2003. *See Mont. Right to Life Assn.*, 343 F. 3d 1085.

In affirming the district court, the Ninth Circuit relied on both *Buckley* and *Shrink Missouri* and concluded that the contribution limits are closely drawn. *Mont. Right to Life Assn.*, 343 F.3d at 1094. It held that the evidence showed that the limits do not prevent candidates in Montana from raising the funds necessary to mount effective campaigns. *Id.* at 1094–95. That decision is not binding on this Court because the U.S. Supreme Court's intervening decision in *Randall* compels a different outcome. *See Kilgore v. KeyBank, Nat. Assn.*, 673 F.3d 947, 959 (9th Cir. 2012).

IV. *Randall v. Sorrell*, 548 U.S. 230 (2006)

In *Randall*, which was decided after the Ninth Circuit's decision in *Montana Right to Life Assn.*, the U.S. Supreme Court examined Vermont's contribution limits and held, for the first time, that a contribution limit violated the First Amendment by failing the closely-drawn scrutiny standard of review. 548 U.S. 230; *see Thalheimer*, 343 F.3d at 1127 (discussing *Randall*, 548 U.S. 230).

Prior to *Randall*, Vermont limited single, individual contributions to a campaign during a two-year general election cycle as follows: governor, lieutenant governor, and other statewide offices, $400; state senator, $300; and state

representative, $200. *Randall*, 548 U.S. at 239. Political committees and political parties were subject to the same limits. *Id.* "Volunteer services" did not qualify as contributions under Vermont's law prior to *Randall*. *Id.*

When it analyzed the constitutionality of Vermont's contribution limits, the *Randall* Court applied the familiar *Buckley* and *Shrink Missouri* test described above—i.e., contribution limits are unconstitutional under the First Amendment if they "prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy.'" *Randall*, 548 U.S. at 248 (quoting *Buckley*, 424 U.S. at 21).

A majority of justices in *Randall* concluded that Vermont's contribution limits were unconstitutional. Three justices—Justices Kennedy, Thomas, and Scalia—opposed contribution limits as a matter of principle and concluded that they violate the First Amendment. 548 U.S. at 264–73. Three other justices—Justices Breyer and Alito and Chief Justice Roberts—opposed the Vermont contribution limits based on the five factors discussed in Justice Breyer's plurality opinion. *Id.* at 253–64. These six justices are a strong majority of the Court, and their judgment is binding on this Court, even if Justice Breyer's plurality opinion is only persuasive. *See Thalheimer*, 645 F.3d at 1127 n.5.

The *Randall* plurality first observed that Vermont's contribution limits showed "danger signs" by comparing those limits to the much higher limits that

the Court had previously upheld. 548 U.S. at 249–53. Prior to *Randall*, the lowest limit the Court had upheld was Missouri's limit of $1,075 per election (adjusted for inflation) to candidates for Missouri state auditor. *Id.* at 251 (citing *Shrink Mo.*, 528 U.S. 377). Of particular importance here, the *Randall* plurality also observed that Vermont's contribution limits—along with Montana's limits and the limits of six other states—were among the lowest in the country. *Id.* 548 U.S. at 251.

After discussing these "danger signs," the *Randall* plurality examined the record independently and carefully to determine whether Vermont's contribution limits were "closely drawn" to match Vermont's interests. *Id.* at 253. In doing so, the plurality pointed to five specific factors that led it to conclude that Vermont's contribution limits were unconstitutionally low:

1. the record suggested that Vermont's contribution limits significantly restricted the amount of funding available for challengers to run competitive campaigns, *id.* at 253–56;

2. Vermont's insistence that political parties abide by exactly the same contribution limits that applied to other contributors threatened the political parties' associational rights, *id.* at 256–59;

3. while Vermont's law did not count "volunteer services" as contributions, the law appeared to count the expenses of volunteers (e.g., the volunteers' travel expenses) as contributions, *id.* at 259–60;

4. Vermont's contribution limits were not adjusted for inflation, *id.* at 260; and

5. there was no special justification that supported the contribution limits, *id.* at 261–62.

The *Randall* opinion is directly on point here. The *Randall* decision undeniably paints a new gloss on the law and provides important insight into the lower bound for contribution limits. *Randall* is intervening law that obviates *Montana Right to Life*'s precedential value, particularly in light of the *Randall* plurality's expressed suspicion of Montana's contribution limits. *See Randall*, 548 U.S. at 251.

V. The constitutionality of Montana's contribution limits after *Randall*

Randall compels the Court to conclude that Montana's contribution limits are unconstitutionally low. Montana's contribution limits are, in part, lower than those declared unconstitutional in *Randall*.[4] But, more fundamentally, the same "danger signs" are present here as in *Randall*, and the same five *Randall* factors demonstrate that Montana's limits are unconstitutional. Even assuming that the State of Montana has a "sufficiently important interest" in setting contribution limits, the limits in Montana Code Annotated § 13–37–216 are not "closely drawn" to match that interest. *See Randall*, 548 U.S. at 247.

[4] In *Randall*, the U.S. Supreme Court found unconstitutional Vermont's contribution limit of $200 for state representative elections and $300 for state senate elections. 548 U.S. at 239, 249–62. By comparison, Montana's limits for these same elections is $160. Admin. R. Mont. 44.10.338(1).

A. "Danger signs"

The Court does not need to look far to see the same "danger signs" present here that were present in *Randall*. Montana's contribution limits are far lower than any limits that the U.S. Supreme Court has previously upheld. *See Randall*, 548 U.S. at 249–52; *See Shrink Mo.*, 528 U.S. 377 (upholding a $1,075 contribution limit); *Buckley*, 424 U.S. 1 (upholding a $1,000 contribution limit). Indeed, Montana's limits are lower, in part, than limits that the Supreme Court declared unconstitutional in *Randall*. Moreover, the U.S. Supreme Court has previously observed that Montana's limits, like Vermont's former limits, are among the lowest in the country. *Id.* at 251. Given these "danger signs," the Court "must examine the record independently and carefully to determine whether [Montana's contribution limits] are 'closely drawn' to match the State's interests." *Id.* at 253.

B. The five *Randall* factors

The five *Randall* factors listed above are not exhaustive. Nor must all of the factors weigh against the constitutionality of a limit in order for that limit to be unconstitutional. In other words, the *Randall* "factors" do not constitute a "test." They are merely considerations. That being said, the Court concludes that the *Randall* factors compel the Court to conclude that Montana's contribution limits are unconstitutional.

1. Significant restriction of available funds

As in *Randall*, the record here suggests that Montana's contribution limits significantly restrict the amount of funds available for candidates to run competitive campaigns. 548 U.S. at 256.

By way of comparison, Montana's contribution limit for individuals and political committees contributing to state legislative candidates is significantly lower than Vermont's contribution limits that were declared unconstitutional in *Randall*. Vermont's limits were $300 for State Senate and $200 for State House, *see Randall*, 548 U.S. at 239, but Montana's current limit for those candidates is $160, Admin. R. Mont. 44.10.338(1).

Generally speaking, candidates in Montana spend more money on their campaigns than they raise. According to Clark Bensen, the plaintiffs' expert witness, the average competitive campaign spends 7% more money than it raises. This suggests that most competitive campaigns are not adequately funded. The record shows, though, that more funding would be available to candidates if Montana's contribution limits are raised. Bensen testified that, on average, 29% of the contributors in the competitive campaigns that he analyzed had donated at the maximum level permitted by Montana law. The contributions that candidates receive from maxed-out contributors are substantial, constituting approximately 44% of the funds raised through itemized contributions.

The analysis from Edwin Bender, the defendants' expert, is largely consistent with these statistics. Bender additionally determined that across all Montana races (excluding the gubernatorial races) between 45% and 58% of contributing political committees make the maximum contribution permitted by Montana law. But only 9% to 11% of legislative candidates' funds come from political committees, and only 0% to 3% of statewide candidates' funds come from political committees.

Consistent with the testimony of Plaintiffs Doug Lair and Steve Dogiakos, many, if not most, of these maxed out contributors might have donated beyond the contribution limit if Montana law had permitted them to do so. Moreover, Bender determined that between 22% and 32% of all Montana candidates accepted the maximum aggregate contribution from their political party. According to Bensen, this percentage is higher—at 40%—for candidates in competitive campaigns.

The number of contributors making contributions at the maximum level is significant. And significantly greater funds would be available to candidates if the contribution limits are raised. The defendants do not dispute this proposition. The record shows that those additional funds are needed because most campaigns are insufficiently funded. This factor "counts against the constitutional validity of the contribution limits." *Id.* at 256.

2. Uniformity of contribution limits

In *Randall*, the fact that Vermont's law required political parties to abide by the same contribution limits as other contributors weighed against the constitutionality of those limits. 548 U.S. at 256. The *Randall* Court held that the uniform contribution limit "threaten[ed] harm to a particularly important political right, the right to associate in a political party." *Id.* (citations omitted).

Here, the contribution limits for political parties are 5 to 36 times greater than the limits for individuals and political committees, depending on office. But those limits are deceptive. Suppose there is a competitive State House race and all of the approximately 50 Republican party committees in the State would like to contribute to that candidate's campaign. The aggregate limit for political party contributions to State House races is $800. Admin. R. Mont. 44.10.338(2). That means that each Republican party committee would be permitted to contribute only $16 to the campaign if all committees contributed. This is an extreme and perhaps unlikely example. Nevertheless, this example shows that relatively higher, aggregate contribution limits for political parties do not always protect associational rights for political parties.

Even assuming that the aggregate limit for political parties is constitutional, Montana's contribution limits still raise associational concerns because the same contribution limits apply to both individuals and political committees.

As the Ninth Circuit recently acknowledged, "voters in Montana" are constitutionally entitled to a "full and robust exchange of views." *Sanders Co. Republican. C. Comm. v. Bullock*, ___ F.3d ___, 2012 WL 4070122 at *1 (9th Cir. Aug. 31, 2012). The Supreme Court explained in *Buckley* that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." 424 U.S. at 15 (citations and internal quotation marks omitted). A political committee's campaign contribution is political speech, protected by the First Amendment, that fosters a full and robust exchange of views. *See generally Citizens United*, 130 S. Ct. 876; *Buckley*, 424 U.S. 1.

By holding political committees to the same contribution limits as individuals, Montana's contribution limits inhibit the associational rights of political committees and, consequently, a "full and robust exchange of views." *Sanders Co. Republican C. Comm.*, 2012 WL 4070122 at *1.

This conclusion can be illustrated by a hypothetical that the U.S. Supreme Court employed in *Randall*. Suppose that thousands of voters in Montana support the agenda advanced by a particular political committee. Suppose also that the voters do not know which elections in the State are most critical to advancing that agenda. Those voters may simply donate their money to the political committee instead of a particular candidate and then let the committee determine the elections

to which those funds should be contributed. If the political committee has, as a result, thousands of dollars available to contribute but targets only a handful of races, the committee will quickly reach its contribution limits without being able to deploy all of the money it received. Consequently, the aims of thousands of donors will be thwarted. *Cf. Randall*, 548 U.S. at 257–58 (applying the same hypothetical to political parties).

By holding political committees to the same contribution limits as individuals, Montana has "reduce[d] the voice of political [committees] to a whisper." *Randall*, 548 U.S. at 259 (citations and internal quotation marks omitted). This inhibition is aggravated by the fact that Montana imposes an aggregate contribution limit on political committees, *see* Mont. Code Ann. § 13–37–218, although, as noted above, the constitutionality of that aggregate limitation is not at issue in this case.

Even the testimony of the defendants' expert supports this conclusion. Bender testified that, in legislative races, contributions from political committees accounted for only 9% to 11% of the total contributions from 2004 to 2010. For statewide races, the percentage was between 0% and 3%, and for the gubernatorial races it was 0%.

The potential harms to political committees' associational rights is an additional factor weighing against the constitutionality of Montana's contribution

limits.

3. Volunteer services

Montana, like Vermont prior to *Randall*, does not count the value of volunteer services as a contribution. *See In re Bullock* (Ex. 8).

The decision from the Commissioner of Political Practices in *In re Bullock*, which recently affirmed this proposition, is consistent with Montana's statute defining "contributions." *See* Mont. Code Ann. § 13–1–101(7)(b)(i). That statute expressly excludes from the definition of "contribution": "services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee . . . ." *Id.*; *see also* Admin. R. Mont. 44.10.321(2). But, just like Vermont's statute prior to *Randall*, Montana law "does not exclude the expenses those volunteers incur, such as travel expenses, in the course of campaign activities." *Randall*, 548 U.S. at 259.

The *Randall* Court observed that "[t]he absence of some such exception may matter . . . where contribution limits are very low." *Id.* at 260. It explained:

> That combination, low limits and no exceptions, means that a gubernatorial campaign volunteer who makes four or five round trips driving across the State performing volunteer activities coordinated with the campaign can find that he or she is near, or has surpassed, the contribution limit. . . . Such supporters will have to keep careful track of all miles driven, postage supplied (500 stamps equals $200), pencils and pads used, and so forth. And any carelessness in this respect can prove costly, perhaps generating a headline, "Campaign laws violated," that works serious harm to the candidate.

Id. As in *Randall*, then, this factor weighs against the constitutionality of Montana's contribution limits.

4. Inflation adjustment

Montana's contribution limits, unlike Vermont's prior to *Randall*, are adjusted for inflation, Mont. Code Ann. § 13–37–216(4), although feebly so. So this factor does not necessarily weigh against the constitutionality of Montana's contribution limits.

Nevertheless, the Court notes that the testimony at the bench trial suggests that the inflationary adjustment, which is based on the Consumer Price Index, has not have kept pace with the actual increasing cost of running an effective campaign. As Bensen testified, the Consumer Price Index does not consider factors such as the increasing cost of advertising, hiring media consultants, and technology that may be needed to run an effective campaign. We are in a new age when it comes to campaign financing.

Even if Montana's inflationary adjustment adequately accounts for the increasing costs of running a campaign, the problem with Montana's limits is that the inflationary adjustment is added to a base limit that is simply too low to allow candidates to "amass[ ] the resources necessary for effective campaign advocacy." *Randall*, 548 U.S. at 249 (citations and internal quotation marks omitted).

5. Special justification

Finally, as in *Randall*, there is no evidence in the record of "any special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems" described above. *Randall*, 548 U.S. at 261. The defendants have not presented any evidence showing that corruption in Montana is more rampant than in any other state where contribution limits are much higher. As Ms. Baker, of the office of the Commissioner of Political Practices, testified, larger contribution limits—such as $1,000—would not likely have a corruptive effect. While the Court has "no scalpel to probe each possible contribution level," *Randall*, 548 U.S. at 249, such a limit comes closer to the limits that the U.S. Supreme Court has previously upheld, *see Buckley*, 424 U.S. 1; *Shrink Mo.*, 528 U.S. 377.

C. Severability

Apparently because of the large number of candidates and elections involved, plaintiffs have focused their efforts on attacking the lowest of Montana's contribution limits—e.g., the $160 limit for individual contributors to "other public office[s]," such as state house and senate races. They have not so seriously challenged, for instance, the contribution limits for gubernatorial candidates. Nevertheless, the Court will not sever some of the contribution limits from others that could conceivably be constitutional. *See Randall*, 548 U.S. at 262. As the *Randall* Court explained:

> We add that we do not believe it possible to sever some of the Act's contribution limit provisions from others that might remain fully operative. *See Champlin Refining Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234, 52 S.Ct. 559, 76 L.Ed. 1062 (1932) ("invalid part may be dropped if what is left is fully operative as a law"); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) (severability "essentially an inquiry into legislative intent"); Vt. Stat. Ann., Tit. 1, § 215 (2003) (severability principles apply to Vermont statutes). To sever provisions to avoid constitutional objection here would require us to write words into the statute (inflation indexing), or to leave gaping loopholes (no limits on party contributions), or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found. Given these difficulties, we believe the Vermont Legislature would have intended us to set aside the statute's contribution limits, leaving the legislature free to rewrite those provisions in light of the constitutional difficulties we have identified.

Randall, 548 U.S. at 262. Indeed, as the U.S. Supreme Court presaged in *Randall*, the Montana Legislature will have an opportunity to revisit the contribution limits in three months when it convenes.

This court's October 3, 2012 Order and its October 9, 2012 Order Denying Stay are hereby incorporated herein by reference.

As the Court stated in its order denying the defendants' motion to stay the judgment in this case, much has been made of whether striking Montana's contribution limits is good policy and good for Montana voters. This case, though, is not about policy. It is about following the law that the United States Supreme Court set out.

CONCLUSION

Montana's contribution limits in Montana Code Annotated § 13–37–216 prevent candidates from "amassing the resources necessary for effective campaign

advocacy." *Randall*, 548 U.S. at 249 (citations and internal quotation marks omitted). They are therefore unconstitutional.

The 2013 Legislature will convene in less than three months, and it will probably consider whether to address the other statutes that the Court has already declared unconstitutional and for which the appeals have been dismissed. With entry of this order, the Legislature will have a clean canvas upon which to paint, should it choose to do so.

IT IS ORDERED that the Court's order declaring the contribution limits in Montana Code Annotated § 13–37–216 unconstitutional and permanently enjoining the defendants from enforcing those limits is hereby confirmed subject however to the Circuit's temporary stay order received only minutes ago.

Dated this 10th day of October 2012.

CHARLES C. LOVELL
SENIOR UNITED STATES DISTRICT JUDGE

QUESTIONS ON I-166

FOR CB PEARSON

1. DID COMMON CAUSE, A WASHINGTON D.C. CORPORATION, PAY FOR MOST OF THE WORK ON -166?
2. Do you work for M+R Strategies. Is that a corporation.
3. Would common cause and M and R strategies be able to do initiatives like I-166 were we to act today
4. What authority does a state legislature have to overturn a 1st amendment protection?
5. if we're not allowing artificial government created entities, namely corporations, to be excluded from 1st amendment protections, then why not unions or other special interests groups and others exercising association rights?
6. Why are unions not included in this resolution?
7. Haven't corporations been held to have constitutional rights since the early 1800s?

On Wednesday, October 3, 2012, at 1:50pm MDT, the district court below held that Montana's individual contribution limits, PAC contribution limits, and aggregate political party contribution limits–all found at MCA Section 13-37-216–were unconstitutional and enjoined Appellees from enforcing the statute. (*Order*, Doc. 157, attached to Appellants' Mot. Stay as Ex. 1.) That evening, Appellees (collectively "the Commission") filed a motion to stay the injunction issued against them pursuant to Federal Rule of Civil Procedure 62. (Doc. 159, attached to Appellants' Mot. Stay as Ex. 3.) On Thursday, October 4, 2012, the federal court *sua sponte* expedited the briefing schedule for that motion, affording Appellants (collectively "the Contributors") until Monday, October 8, 2012, to file any response, after which time the Court would consider the motion submitted for prompt resolution. (Doc. 160.) After filing its Notice of Appeal, the Commission filed an Emergency Motion for Stay Pending Appeal under Federal Rule of Appellate Procedure 8 and Ninth Circuit Rule 27-3. While awaiting the disposition of its motions to stay, the Commission has disseminated a letter to the public threatening those who lawfully act pursuant to the district court's injunction with possible retroactive enforcement if either the district court or this Court grants a

1500

stay. (*Commission Letter*, attached as Ex. 1.) The Contributors now timely file their response.

Argument

This case involves two challenges: twofold: **1)** whether Montana's aggregate political committee contribution limits ("aggregate contribution limits") are constitutional, **2)** whether Montana's individual and PAC contribution limits are too low to be constitutional.

Under Montana Code Annotated Section 13-37-216(3), political committees are subject to the following aggregate limitations, subject to inflation . . .:

> (a) for candidates filed jointly for the offices of governor and lieutenant governor, not to exceed $18,000;
> (b) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $6,500;
> (c) for a candidate for public service commissioner, not to exceed $2,600;
> (d) for a candidate for the state senate, not to exceed $1,050;
> (e) for a candidate for any other public office, not to exceed $650.

Appellee Beaverhead County Republican Central Committee had candidate contributions returned to it because candidates have received the legal limit of contributions from other political committees throughout the state. (Trial Ex. 6.) Appellee Lake County Republican Central Committee adjusted the amount of its

contributions in light of contributions already received by candidates. Representative Miller, a witness in this matter, was $140 away from hitting the political party aggregate contribution limit at the time of trial and would need to return any checks beyond that amount. As a result of the aggregate contribution limit, the Lake County Republican Central Committee's campaign speech and association was burdened, the speech and associational rights of the Beaverhead County Republican Central Committee were completely chilled, and candidates like Mike Miller and John Milanovich are likewise burdened and chilled from associating with political party committees.

The individual and PAC contribution limits, found at MCA Sections 13-37-216(1) and (3), set contribution limits at the following:

> (i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed $500;
> (ii) for a candidate to be elected for state office in a statewide election, other than the candidates for governor and lieutenant governor, not to exceed $250;
> (iii) for a candidate for any other public office, not to exceed $130.
> (1)(b) A contribution to a candidate includes contributions made to the candidate's committee and to any political committee organized on the candidate's behalf.

Appellees Doug Lair and Steve Dogiakos both would give beyond these limits. And candidates like Rep. Miller and Appellee John Milanovich would,

whether in this or in future election cycles, accept contributions from both PACs and individuals in excess of the contribution limit.

The Contributors are engaging in conduct proscribed by Montana's contribution limits in the 2012 general election cycle because these limits have been struck down and enjoined.

I. The Commission's Motion Suffers Procedural Defects.

Federal Rule of Appellate Procedure 8 governs requests for stays pending appeal. Under that Rule, a party seeking an order for a stay while an appeal is pending first "must ordinarily move first in the district court." FRAP 8(a)(1)(C). Such a motion can be made to this Court only if the moving party can show either that (1) "moving first in the district court would be impracticable;" or (2) a motion was made, and "the district court denied the motion or failed to afford the relief requested." FRAP 8(a)(2)(A); see also Circuit Rule 27-3(a)(4) ("If the relief sought in the motion was available in the district court . . . , the motion shall state whether all grounds advanced in support thereof in this court were submitted to the district court . . . , and, if not, why the motion should not be remanded or denied.").

The Commission's motion fails to meet this requirement. Indeed, nowhere

in its motion does the Commission contend waiting for the district court to rule is impracticable. And the fact that the Commission's motion will not be submitted to the Court until, at the latest, October 8, 2012, is, a circumstance of its own making. The district court conduct a trial on these three issues September 12-14, 2012. Prior to that hearing, during the hearing, or in the weeks prior to the Court's ruling on October 3, 2012, the Commission could have asked the district court—if it ruled against the Commission—to stay its decision pending appeal. It failed to do so. Moreover, after the district court ruled, the Commission could have sought expedited relief in the district court, but it failed to do so. The Commission made no mention that such expedition was desired or necessary in its motion to stay. For instance, the Commission could have requested that the district court hear its motion telephonically without briefing. *See* Local Rules, Mont. 7(e) ("The Court may hear argument on the record in open court, by video conference, or by telephone conference call."). Instead, it was the Court *of its own volition* that expedited the briefing schedule for the Commission's motion. It was not "impracticable" to take these steps, and the Commission's failure to do so does not entitle it to the relief it seeks here.

The Commission's motion is deficient for another procedural reason as well.

A motion for an injunction to this Court brought under Rule 8(a) is required to include (1) "originals or copies of affidavits or other sworn statements supporting facts subject to dispute" and (2) relevant parts of the record. FRAP 8(a)(2)(B). The Commission contends that the district court erred in finding Section 13-37-216 unconstitutional and in enjoining that statute. But the Commission failed to comply with FRAP 8(a)(2)(B) by providing this Court with the record evidence that was before the district court when it ruled. In part, this is because the district court has not issued its findings of fact and conclusions of law merely two days after it issued its ruling. But the Commission was notified by the court below that copies of the transcript were available to be ordered on September 28, 2012. (*See* Docs. 154-156) (providing information on how to secure transcripts for each of the three days of trial). With nothing before this Court but the Commission's "good-faith belief that [it] is accurately representing the record," this Court cannot properly evaluate the Commission's argument that it is likely to prevail on the merits.

Indeed, this lack of record should signal to this Court to proceed with caution. In *Purcell v. Gonzalez*, 549 U.S. 1 (2006), the Ninth Circuit reversed a district court without the benefit of having the district court's findings of facts and

conclusions of law before it and without making any findings of fact and conclusions of law of its own, to justify reversal. *Purell,* 549 U.S. at 5. The United States Supreme Court determined this was reversible error because, while the Ninth Circuit's concern with time was laudable, the Ninth Circuit reversed the district court without any findings of fact and thus failed to give the requisite deference to the district court's finding. *Id.* at 5. This Court's concern is in reaching a correct result, not simply a speedy one.

In sum, the Commission has failed to comply with the basic procedural rules governing the present motion. The Court should deny the motion accordingly.

II. The Commission Cannot Satisfy The Stay Requirements.

The Commission misstates the test that it must satisfy in order to justify a stay of the district court's injunctive order, presenting to this Court the albeit similar preliminary injunction standard of review rather than the stay pending appeal standard of review. Granting a stay pending appeal turns on:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Leiva-Perez v. Holder, 640 F.3d 962, 964 (9th Cir. 2011) (*quoting Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The burden lies with the Commission to establish that these factors have been satisfied. *Holder,* 640 F.3d at 864. The Commission fails to meet this burden.

A. The Commission Cannot Show Likely Success On The Merits.

The Commission claims that it has a substantial likelihood of success on the merits, claiming that the Contributors have not adequately demonstrated, both as a matter of fact and as a matter of law, that *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003) controlled the outcome of their challenge.[1] (Appellants' Mot. Stay at 8-12.) Yet it is clear from the district court's Order that the post-*Eddleman* decision of *Randall v. Sorrell*, 548 U.S. 230 (2006) was at least sufficient persuasive, if not mandatory, for the district court to strike down Section 13-37-216. The Commission's contentions that *Eddleman* mandates upholding the statute and that *Randall* does not apply under *Thalheimer* were thus not successful. And under *Randall*'s factually-intensive five factor test, the court below found that 13-37-216 "prevent[s] candidates from 'amassing the resources necessary for effective campaign advocacy.'" (Doc. 157, at 5) (*citing Randall*, 548 U.S. at 249).

[1]

Without the benefit of the district court's factual findings and legal analysis, the Contributors and this Court cannot know with certainty what facts and law lead to the district court's ruling in this regard nor be able to analyze their adequacy. The Commission's motion presents to this Court its post-trial brief nearly verbatim. (*See* Doc. 152.) Without the benefit of the district court's findings, the Commission essentially asks this Court to act as a court of original jurisdiction without the benefit of a transcript or trial proceedings and nullify the district court's trial work before it has even been completed. The Contributors object to this improper role on both legal grounds, because this Court is a court of appellate jurisdiction, and on practical grounds, because neither the parties nor this Court can meaningfully discuss or review the merits of the district court's findings. But insofar as this Court thinks such review is appropriate, the Contributors similarly present to this Court its arguments from their post-trial brief and post-trial reply brief. (Docs. 151 and 153.)

1. **The Standard of Review Is Exacting Scrutiny In the Ninth Circuit, But Ought to Be Strict Scrutiny.**

The Commission argues that a lower level of scrutiny applies to the contribution limits. (Appellants' Mot. Stay at 10-12.) The contribution limits at issue here either chill or substantially burden core political activity protected by

the First Amendment rights of free expression and association, so Montana must justify them under "the closest scrutiny" and any restriction must "avoid unnecessary abridgement of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 21-22, 24-25 (1976). *Buckley* held that contribution limits pose lesser First Amendment burdens than do expenditure limits and so imposed what has been interpreted as lower scrutiny on contributions. *Compare* 424 U.S. at 23 ("expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association") *with id.* at 25 (contribution limits require "sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms") *and id.* at 44-45 ("exacting scrutiny applicable to limitations on core First Amendment rights of political expression"). In *McConnell v. FEC*, 540 U.S. 93, 141 (2003), the Court said, "we apply the less rigorous scrutiny applicable to contribution limits." 540 U.S. at 141.

More recently, the Court has imposed higher "strict scrutiny" on "laws that *burden* political speech," *Citizens United v. FEC*, 130 S.Ct. 876, 898 (2010) (citation omitted) (emphasis added), albeit in the context of a political speech ban. The Contributors recognize that the Ninth Circuit has applied less rigorous

scrutiny to contribution limits, *see, e.g., Thalheimer v. City of San Diego,* 645 F.3d 1109, 1117-1118 (9th Cir. 2011), and that this Court is obligated to apply this level of scrutiny. But to preserve this issue, the Contributors challenge any lowered scrutiny of limits on campaign contributions as unconstitutional and, to the extent that *Buckley* is interpreted as imposing lowered scrutiny on contribution limits than on expenditure limits, expressly call for the reconsideration of *Buckley* on that issue.[1]

2. Ninth Circuit Precedent Does Not Mandate a Finding of Constitutionality.

The Commission argues that the Ninth Circuit evaluation Montana's individual contribution limits in *Montana Right to Life Ass'n v. Eddleman,* 343 F.3d 1085, 1092 (9th Cir. 2003) dictates the outcome of this matter. (Appellants' Mot. Stay at 8-9.) The *Eddleman* court found that the contribution limits were constitutional, applying the standard articulated in *Buckley* and *Shrink Missouri.*

[1] Plaintiffs preserve this argument for the U.S. Supreme Court, whose members have debated whether lower scrutiny is proper for contribution limits and other burdens on political association. *See Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 192 n.12 (1999); *id.* at 206, 214 (Thomas, J., concurring in the judgment); *Randall*, 548 U.S. at 242-44 (plurality); *id.* at 263 (Alito, J., concurring in part and concurring in judgment); *id.* at 264 (Kennedy, J., concurring in judgment); *id.* at 266 (Thomas, J., joined by Scalia, J., concurring in judgment).

Id. Specifically, the *Eddleman* court determined that

> state campaign contribution limits will be upheld if (1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and (2) if the limits are 'closely drawn'-i.e., if they (a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign.

Id. And indeed, "[a]s long as the limits are otherwise constitutional, it is not the prerogative of the courts to fine-tune the dollar amounts of those limits." *Id.* at 1095.

This analysis was further developed in the 2006 *Randall v. Sorrell* decision. 548 U.S. 230. There, the United States Supreme Court introduced a five factor test that applied once it was confirmed that the limits at issue served a cognizable interest: "the interests underlying contribution limits, preventing corruption and the appearance of corruption, "directly implicate the integrity of our electoral process," but where there are danger signs under the five factor test, "courts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's "tailoring," that is, toward assessing the proportionality of the restrictions." *Randall*, 548 U.S. at 249 (internal citations omitted).

The five factor test was not employed in *Eddleman* and so the Montana

limits have not been assessed under the *Randall* test. For example, the *Eddleman* court relied on an expert report that analyzed *all* candidate races. But the *Randall* decision makes very plain that the proper analysis requires review of funding available for competitive races. *See Randall*, 548 U.S. at 254-55. Additionally, the *Eddleman* court focused exclusively what *Randall* articulates as the first factor: the competitiveness of a challenger's campaign. *See Eddleman*, 343 F.3d at 1092 (focusing its analysis on whether the limits "allow the candidate to amass sufficient resources to wage an effective campaign."). In short, the *Eddleman* decision is of little weight here because its analysis does not satisfy current Supreme Court jurisprudence.[2]

The Ninth Circuit, faced with a similar circumstance where an intervening Supreme Court decision changed the legal analysis before it, stated:

[2] It is not uncommon for federal courts to reanalyze prior decisions because subsequent Supreme Court decisions necessitate it. For example, the Fourth Circuit upheld North Carolina's matching fund program for judicial candidates in 2008. *See North Carolina Right to Life Committee Fund for Independent Expenditures v. Leake,* 524 F.3d 427 (4th Cir. 2008). In 2011, the United States Supreme Court decided *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 131 S.Ct. 2806 (2011), which found that matching fund programs unconstitutionally burden protected First Amendment speech. Upon subsequent challenge, the North Carolina district court reviewed the scheme again under the United States Supreme Court standard to find the scheme unconstitutional, notwithstanding the Fourth Circuit decision upholding the program. *North Carolina Right to Life Political Action Committee v. Leake,* No. 5:11-cv-472-FL, 2012 WL 1825829 at *7 (E.D.N.C. 2012).

> [W]hen existing Ninth Circuit precedent has been undermined by subsequent Supreme Court decisions, this court may reexamine that precedent without the convening of an *en banc* panel. *See Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 492 (9th Cir.1979) (Because later Supreme Court case had "undermined" theory of earlier 9th Circuit precedent, panel expressly rejected theory of earlier case.).

LeVick v. Skaggs Companies, Inc., 701 F.2d 777, 778 (9th Cir. 1983). Stated another way, Ninth Circuit courts "are bound by prior panel opinions 'unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions.'" *In re Findley*, 593 F.3d 1048, 1050 (9th Cir. 2010) (*quoting Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1441 (9th Cir. 1994). With the intervening decision of *Randall* along with the May 15, 2012 *Bullock* opinion redefining political contributions, the district court was not and this Court is not bound by *Eddleman*. Rexamination under *Randall* is appropriate.

And under the proper analysis, the contribution limits fail.

3. None of the Limits Serve A Cognizable Interest.

The first point of inquiry for scrutiny analysis is whether the law in question serves a recognized state interest. *See Thalheimer,* 645 F.3d at 1118. When no cognizable interest exists, contribution limits cannot stand "[n]o matter which standard of review governs." *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010). Under either strict or intermediate scrutiny, all of the contribution limits are

unconstitutional because they serve no recognized interest.

a. No Anti-Corruption Interest Applies.

"[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. National Conservative PAC*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*"). Corruption is strictly defined: "Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id.* at 497. *Citizens United* reaffirmed that corruption involves only quid-pro-quo corruption; it rejected influence, access, gratitude, and leveling the political playing field as cognizable corruption. 130 S.Ct. at 909-12. *See also Bennett*, 131 S.Ct. at 2821 (rejecting equalizing interest); *Davis v. FEC*, 554 U.S. 724, 742 (2008) (same).

A cognizable quid-pro-quo corruption is based on a *financial* benefit to a *particular* candidate in such a "large" amount, *Buckley*, 424 U.S. at 26 (anticorruption interest triggered by "large contributions"), as to cause a candidate "to act contrary to [his or her] obligations of office," *Citizens United*, 130 S.Ct. at 497.

i. The Aggregate Contribution Limits Do Not Prevent Corruption.

Political party committees pose no cognizable quid-pro-quo-corruption risk to their candidates. As stated by three Justices in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado-I*"), "We are not aware of any special dangers of corruption associated with political parties. . . ." *Id.* at 616 ("Breyer, J., joined by O'Connor & Souter, JJ.). Another three agreed:

> As applied in the specific context of campaign funding by political parties, the anti-corruption rationale loses its force. . . . What could it mean for a party to "corrupt" its candidate or to exercise "coercive" influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes. When political parties achieve that aim, that achievement does not, in my view, constitute "a subversion of the political process."

Id. at 646 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment and dissenting in part) (citations omitted). Thus, in *Colorado-I* an anticorruption interest could not be used as a basis to prohibit political-party committee independent expenditures, and here it cannot be used to limit contributions to candidates from political parties.

ii. The Individual and PAC Contribution Limits Are Too Low to Advance A Corruption Interest.

Even if corruption in general is an interest of the state of Montana, the

individual and PAC contribution limits are too low to serve that interest. As Appellant's witness Ms. Baker of the Commission of Political Practices testified, there is no risk of corrupting a candidate with a $1,000, even $2,500 contribution. Yet these limits are set as low as $160 for legislative candidates, well below that amount.

The individual and PAC contribution limits do not serve an anticorruption interest.

iii. The Individual and PAC Contribution Limits and the Aggregate Contribution Limits Are Underinclusive.

All of the contribution limits challenged here are also underinclusive as to any anticorruption interest. A law is underinclusive when large portions of speech which would advance the interest propounded by the state are left unregulated, thereby "render[ing] belief in the purpose a challenge to the incredulous." *Republican Party of Minnesota v. White,* 536 U.S. 765, 780 (2002) (*citing City of Ladue v. Gilleo,* 512 U.S. 43, 52-53 (1994) (noting that underinclusiveness "diminish[es] the credibility of the government's rationale for restricting speech") *and Florida Star v. B.J. F.,* 491 U.S. 524, 541-542 (1989) (Scalia, J., concurring in judgment) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves

appreciable damage to that supposedly vital interest unprohibited" (internal quotation marks and citation omitted)).

According to the *Montana Republican Party v. Bullock* decision, issued by the Commission on Political Practices on May 15, 2012, (Trial Ex. 8), contributions in Montana do not include paying for candidate's staff or any expenses they incur. This exclusion is fatal to the claim that contribution limits serve an anticorruption interest. As Ms. Baker testified, providing services to a candidate is effectively the same as giving money to that candidate's campaign and serves as a benefit to that candidate's campaign. Quid-pro-quo corruption could as readily result from providing unlimited campaign staffing support to a candidate as from giving unlimited amounts of money to that candidate directly.

Moreover, as Appellant's expert Bender testified, the structure of Montana's contribution limit scheme allows PACs to contribute more to candidates than political parties. While it is true that political parties cannot corrupt candidates, the same is not true of PACs. Allow PACs to contribute more than political parties renders the aggregate contribution limit underinclusive.

The aggregate contribution limits, the individual contribution limits, and the PAC contribution limits do not serve the purpose of preventing corruption.

b. No Anti-Circumvention Interest Exists for the Aggregate Contribution Limits.

While "preventing corruption" is the only cognizable interest "for restricting campaign finances," *NCPAC*, 470 U.S. at 496-97, the Supreme Court has recognized a *prophylactic* interest in preventing *circumvention* of the contribution limits that eliminate the quid-pro-quo risk. But just as the scope of cognizable "corruption" was strictly limited by the Supreme Court, *see Citizens United*, 130 S.Ct. at 909-10, "circumvention" is also limited.

First, because the anti-circumvention interest is derivative and prophylactic, there must be a viable quid-pro-quo-corruption risk to begin with. Since *Buckley* held that only "*large* contributions" triggered a quid-pro-quo corruption risk, 424 U.S. at 26 (emphasis added), there is no conduit concern justifying aggregate contribution limits unless it is possible to "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party," *id.* at 38. If the ability to move "massive" funds through a conduit to a candidate is already eliminated by one prophylaxis, there remains no justification for an additional prophylaxis. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 479 (2007) (Roberts, C.J., joined by

Alito, J.) (controlling opinion). It is "not consistent with strict scrutiny," *id.*, nor consistent with the requirement that any contribution "limitation [be] no broader than necessary to achieve th[e governmental] interest," *California Med. Ass'n v. FEC*, 453 U.S. 182, 203 (1981) (controlling opinion), or that the government "avoid unnecessary abridgement of associational freedoms," *Buckley*, 424 U.S. at 25. If one prophylaxis (e.g., the limit on contributions to a candidate from a party committee) eliminates a risk, that risk cannot be used *again* to justify another prophylaxis because the risk is gone.

Second, the government must prove that asserted "harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664 (1994). Just as "[r]eliance on a 'generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle,'" *Citizens United*, 130 S.Ct. at 910 (citation omitted), so also there can be no generic circumvention theory lacking a "limiting principle."

Third, *perceived* "circumvention"—based on barred contributors moving on to other political activity that remains legal—can be a reason to *overturn*

restrictions, not multiply them:

> *Austin* [*v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990),] is undermined by experience since its announcement. Political speech is so ingrained in our culture that speakers find ways to *circumvent* campaign finance laws. See, e.g., *McConnell*[, 540 U.S. at] 176-177 ("Given BCRA's tighter restrictions on the raising and spending of soft money, the incentives . . . to exploit [26 U.S.C. 527] organizations will only increase[.]"). Our Nation's speech dynamic is changing, and informative voices should not have to *circumvent* onerous restrictions to exercise their First Amendment rights.

Citizens United, 130 S.Ct. at 912 (emphasis added). So if would-be contributors to candidates are restricted by contribution limits and instead give to a political committee, that "circumvention" [3] requires careful examination of whether the contribution limits are constitutionally justified.[4]

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[3] *See, e.g.*, Anupama Narayanswamy, *Presidential campaign donors moving to super PACs*, Sunlight Reporting Group (Apr. 26, 2012), http://reporting.sunlightfoundation.com/ 2012/maxed-out-donors/ ("[A]fter some . . . donors hit their . . . contribution limits to President Obama's reelection campaign, they made donations to the super PAC supporting him . . . .").

[4] *Buckley* applied this "circumvention" principle in rejecting a limit on independent expenditures, holding that, because the vagueness of the "expenditure" definition required the express-advocacy construction, people would simply make permitted, non-magic-words communications, making the limit meaningless. 424 U.S. at 45. *Buckley* also noted that the independence of independent expenditures "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Id.* at 47. So "[r]ather than preventing circumvention of the contribution limitations, [the independent expenditure limit] severely restricts all independent advocacy despite its substantially diminished potential for abuse." *Id.* at 47.

As discussed *supra*, political parties cannot corrupt their own candidates, and so no underlying anti-corruption exists. *See* Part I.C.1.a. Montana must rely exclusively on the anti-circumvention interest to justify the aggregate contribution limits. Similarly, PAC contribution limits were upheld by the Supreme Court based exclusively on the anti-circumvention interest. *CMA,* 453 U.S. at 197. However, Montana cannot credibly claim a circumvention interest. Political parties and PACs can circumvent both individual and aggregate limits by paying for unlimited amounts of staff and staff expenses—up to as much as $1,000, $10,000, even $1 million, according to Ms. Baker and Mr. Murry's testimonies. This makes the aggregate contribution limits underinclusive to any anti-circumvention interest. A circumvention interest does not justify any of Montana's contribution limits.[5]

The Commission attempts to distinguish the value of monetary contributions to candidates from paying for support staff to candidates, stating that while "monetary contributions and a political committee providing personal services both benefit a campaign, there are substantial differences." (Appellants' Mot. Stay at 17, 18.) But Mary Baker, who has worked for the Commission for eleven years, expressly said that no distinction exists. And even if it were not the

[5] Circumvention as an interest was not discussed nor argued in *Eddleman.*

equivalent of a monetary contribution, providing unlimited funding for staff to a candidate certainly creates a quid-pro-quo corruption environment to the same extent as giving unlimited amounts of money directly to that candidate.

The Commission contends that there is no evidence that providing personal services have ever been used to circumvent limits imposed. (Appellants' Mot. Stay at 18.)[6] But if there is no evidence that personal services have ever been used to circumvent contribution limits, how can the Commission's defense of a corporate contribution ban in this same lawsuit based on an anti-circumvention interest have been legitimate? That the Commission would seek to prevent corporations from the possibility of circumventing contribution limits but not individuals or PACs suggests that Montana only has an interest in preventing corporate corruption and very little interest in preventing individual or PAC corruption through circumvention.

Neither the aggregate contribution limits nor the individual and PAC contribution limits serve a cognizable interest. Thus, they fail under either strict or "closely drawn" scrutiny and are unconstitutional.

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[6]Notably, the Bullock decision arose from a complaint that personal services provided to a candidate was allowing Montana's contribution limits to be circumvented. (Trial Ex. 8, at 1.) The Commission attempted to get around the circumvention claim by determining that providing personal services was not a contribution.

4. The Limits Are Not Closely Drawn Because They Are Too Low.

Even if the aggregate contribution limits, the individual contribution limits, and the PAC limits somehow serve a cognizable state interest, they must still be properly drawn to ensure that they are "no broader than necessary to achieve that interest." *CMA*, 453 U.S. at 203 (1981) (Blackmun, J., concurring in part and in the judgment). The Court in *Randall* established five factors to ascertain whether contribution limits suffer from improper tailoring.[7] These are: **1)** whether the

[7] *Thalheimer* misstates that the precedential weight of Supreme Court pluralities as persuasive, rather than mandatory, authority. *See Thaleimer*, 645 F.3d at 1127, n. 5. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . ..'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (*quoting Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) In *Randall,* two pluralities presented themselves: three justices—Justices Kennedy, Thomas, and Scalia—would have struck down the limits because a general matter contributions are never constitutional. *Randall*, 548 U.S. at 264-73. And three other justices—Justices Breyer, Roberts, and Alito—would have struck down the contribution limits under the five factors. Justice Breyer's opinion is the narrower of the two pluralities. So under *Marks*, the five factor test is controlling.

However, even if *Randall* is just persuasive, it is the only persuasive decision available to this Court. Indeed, the subsequent district level *Thalheimer* decision solely addresses the question of whether political parties are allowed a robust role under the contribution limits, which is the second factor under *Randall. Thalheimer v. City of San Diego*, No. 09-cv-2862-IEG, 2012 WL 177414 at *9 (S.D. Cal. 2012). And in doing so, no experts or evidence were offered to show that the first factor, whether candidates could mount an effective campaign, was satisfied.

contribution limits significantly restrict the amount of funding available for challengers to run competitive campaigns, *Randall*, 548 U.S. at 253-256; **2)** whether a political party and its affiliates must abide by the same contribution limits that apply to individual contributors, resulting in harm of the right to associate, *id.* at 256-259; **3)** whether it excludes the expenses that volunteers incur in the course of campaign activities, *id.* at 259-260; **4)** whether the limits are adjusted for inflation, *id.* at 261; and **5)** whether there is any special justification for the contribution limits, *id.* at 261. If some of these risk factors exist or "there is a strong indication in a particular case . . . that such risks exist," courts must review the record carefully, focusing on whether the statute is proportionate, that is, whether the restrictions placed on First Amendment rights are in proportion to the harm such restrictions are averting. *Id.* at 249.

This holding is consistent with *Buckley* and *Nixon v. Shrink Missouri Gov't PAC,* 428 U.S. 337 (2000), cases which decisions established the framework for reviewing contributions limits in general. But when faced with a suspect, lower limit in *Randall*, the Court determined it needed to ascertain where that lower bound on contribution limits might be, where "the constitutional risks to the democratic electoral process become too great." *Randall*, 548 U.S. at 248. And so

the Breyer plurality employed a five factor test.

There is no dispute that Montana has unusually low contribution limits. In *Randall*, the Court listed numerous states that had lower contribution limits, including Montana. *Id.* at 251. Likewise, the Commission's expert Bender conceded in his testimony that Maine, Arizona, Alaska and Montana are among the states with the lowest contribution limits.[8] Consequently, the application of *Randall* in this case is clear, and any evidence reviewed by this Court should be viewed through the lens of *Randall.*

To that end, Clark Bensen, the Contributors' expert, reviewed Montana's contribution limits within the five-factor framework, framing his analysis in the context of competitive races only as directed in *Randall.* (Ex. 4 at 1) ("In order to provide the most appropriate analysis the summary statistics focus on candidates in close elections, defined here as a margin of 10% or less of the votes cast.) *See Randall,* 548 U.S. at 254. Bender, the expert offered by the Commission, did not focus his analysis to the *Randall* requirements, but came up with his own—whether elections in Montana were "healthy." Bender's parameters for his analysis were candidates that were within raising twice as much as their opponent,

[8] Notably, these are also the states Mr. Bender testified were among the most competitive. See Ex. 17. See infra Part II.A for a discussion on the deficiencies of Mr. Bender's definition of Òcompetitive.Ó

as applied to all candidates. This goes beyond competitive races and so is too broad a scope under *Randall*. *See id.* at 255.

Similarly, the Pearson analysis the Commission offers focuses on all individual contributions made in house races and senate, and then all PAC contributions made in house and senate races. (*See* Trial Ex. 12.) Pearson's comparisons are also skewed because they look at losses of contributions under the prior, higher limits that subsequently became $100 rather than focusing on losses under the current limits. (*See* Trial Ex. 12 at 1-2.) The Commission's expert and supporting materials are of limited value.

a. The Limits Inhibit Challengers From Running A Competitive Campaign.

Both the aggregate contribution limits and the individual and PAC contribution limits undermine a challenger from running a competitive campaign. Bensen ran two scenarios that analyzed lost campaign dollars under current contribution data. In the first, the contribution limits were raised 50% beyond their current limits to $240. (Trial Ex. 4, at 3.) In the second scenario, the contribution limits were raised 100% to $320. (*Id.* at 3.) Under these scenarios, the average campaign would have lost 15% or 26% respectively of their projected revenue. (*Id.* at 3.) In *Eddleman*, 10% funding losses were reported of "only the

largest contributions," contributions that could be as high as $1000 under the prior contribution limits reviewed. *Eddleman,* 343 F.3d 1094. Extrapolating, then, Bensen's percentages up to the $1000 amount reviewed in *Eddleman* and *Buckley*, or roughly 600% time current rates, the financial loss for current candidates in Montana is much greater than the 10% considered in *Eddleman* and well beyond the 5.1% deprivation found from the $1,000 contribution limit in *Buckley*. *See Buckley,* 424 U.S. at 21 n. 23.

Looked at another way, the C.B. Pearson report and Motl testimony from the *Eddleman* case showed losses of 10% when the contribution limit dropped from $1000 to $100. (Trial Ex. 11, 12.) Bensen's report shows a comparable 15% loss between the current limits of $160 and $240 (Scenario A), with a 26% loss between the current $160 limits and limits at $320 (Scenario B). (Trial Ex. 4, at 3.) Putting the two reports on equal footing then, the current loss between the limits of $160 and $1000, adjusted for inflation, are a multiple of that 26% loss.

The data shows that the competitiveness of races have changed dramatically since *Eddleman*, with the limits imposed creating losses like those reviewed in *Randall*, which projected losses of between 18% to 53%. *Randall*, 548 U.S. at

253.[9] As it did in *Randall*, this suggests that challenger candidates cannot mount an effective campaign in Montana. *Id.*

The Commission argues that Bensen provided no analysis of whether political parties "target" close campaigns in Montana. Defs. (Appellants' Mot. Stay at 14.) However, instead of "targeted" races to determine which races are competitive, as used in *Randall*, Benson examined races within 10%, just the sort of standard endorsed in *Randall* to determine which races were competitive. *See Randall*, 548 U.S. at 254.

The Commission also asserts that Bensen disregarded impact of below threshold donors, underestimating the number of donors to campaigns. (Appellants' Mot. Stay at 14.) But nowhere does the Commission explain the relevance of that data to contribution limit analysis. It is hardly self-evident that contributions below the $35 reporting limit has any relevance to whether or not a candidate can mount a effective campaign under Montana's contribution limits.

Bender testified that a "healthy campaign" is one that is "competitive." However, as Bender acknowledges, low contribution limits can create an artificial competitiveness that is not, in fact, healthy at all and does not meet the purpose of

[9]Using projected losses is a perfectly legitimate form of analysis–it was used in *Randall* to strike down Vermont's limits.

an election. Candidates that have insufficient funding for their campaign cannot get their message out. Thus, as Bender testified, a known Democratic district, for example, could become "competitive" because voters simply are uninformed about the positions of the candidates running. This is not the type of competitive campaign the *Randall* court had in mind to preserve.

The Commission argued to the trial court that a campaign is only effective or competitive if the candidate wins her race. This is false—Bender testified even if no contributions were made, if contributions were completely banned, an election would still have a winner.

As Bender acknowledges, low contribution limits are a significant factor in candidates losing their election, many things affect the outcome of elections. The purpose of a campaign is to get a candidate's message out to the voters so that they can make an informed decision about who ought to represent them. It is getting that message out that makes a campaign competitive. And it is in this competitiveness that the contribution limits—aggregate, individual and PAC—fail.

As Rep. Miller testified, his campaign for a House seat in Montana would need about $12,000 to effectively get a message out to that candidate's voters.

However, candidates in his district are only able to raise between $7,000 to $8,000. This limitation for Rep. Miller is directly related to the aggregate contribution limits, which have necessitated him returning contributions beyond the limit. And it has forced him to choose which half to one third of his potential constituents their campaign will neglect.

This is not for lack of candidate support. As the charts from Bender's report shows, many individuals are maxing out on their contributions, with 1,402 maxing out compared to 4,469 giving under the limit (a ratio of roughly 1:3) in 2010 state house races, (Trial Ex. 21), and with 1,091 maxing out compared to 2,152 giving under the limit (a ratio of roughly 1:2) in 2010 state senate races, (Trial Ex. 22.)[10]

[10] The Commission makes much of unitemized donors, which are irrelevant to a contribution limit challenge, which focuses on how much, not how little, contributors can give. But even so, the facts show that except for in 2006, the receipts from unitemized donors were trivial as compared to those who maxed out. *See* Trial Ex. 21 (showing unitemized contributions amounted to barely more than one quarter of all contributions for 2010, with $75,000 of $272,000 in unitemized contributions for house races); Trial Ex. 50 (showing unitemized contributions amounted to under one third of all contributions for 2010, with with $10,000 of $32,000 in unitemized contributions for statewide offices). (*See also* Trial Ex. 22) (showing $30,581 in unitemized contributions for 2010 as compared to $199,717 in maxed out contributions to senate races (a ratio of roughly 6:1)) *and* Trial Ex. 23 (showing $20,969 in unitemized contributions in 2010 as compared to $254,000 in maxed out contributions to gubernatorial candidates (a ratio of roughly 12:1)). In fact, in 2010, unitemized contributions amounted to only 7%, (*see* Trial Ex. 18), an amount that given the margin of error of +/- 4%, is statistically insignificant.

Rep. Miller's testimony confirms this phenomenon. The difficulty for candidates is that their contributors simply cannot give more.

Meanwhile, PAC and party voices have been reduced to a whisper. *Randall*, 548 U.S. at 259. In 2010, PAC contributions in statewide races were 2% of all contributions. (Trial Ex. 19.) Political party contributions were 4% in both 2008 and 2010. (*Id.*). In 2008 gubernatorial races, PACs gave no contributions at all and political parties contributions were 2% of all contributions. (Trial Ex. 20.) And in 2010, legislative candidate contributions from political committees amounted to 3% of all contributions, and PAC contributions amounted to 9% of all contributions. (Trial Ex. 18.) Yet in 2010, 22% legislative candidates maxed out on party committee donations. (Trial Ex. 26.) And in 2008, 18% of statewide candidates maxed out on party committee contributions. (Trial Ex. 27.)

Moreover, both Bensen and Bender agree that challengers bear the additional structural burden of PACs, which have greater aggregate contribution limits, giving predominantly to incumbents while political parties, which have lower aggregate contribution limits, give predominantly to challengers. This bears out factually in all election years studied except 2006. (Trial Ex. 25.)

Challenger candidates simply cannot run competitive campaigns under the

challenged limits.

b. The Aggregate Contribution Limits Are Much Lower Than The Individual Contribution Limits And Identical PAC Contribution Limits.

The aggregate contribution limits for all political parties is $800. MCA 13-37-216(3). As testimony reflects, there are 50 independent Republican county parties in addition to the state Republican Party, representing approximately 100,000 Republicans across the state. The $800 cap then, representing these 100,000 Montanans, amounts to an eighth of a penny per Montanan. And for each of the 51 parties to be able to associate with any one of their given candidates, they would need to limit their contribution to $15.69. Individuals can give $160 to legislative seats, ten times the amount of any one party. The aggregate contribution limits prevents to the point of trivializing any meaningful association with Montana's political parties. *Randall*, 548 U.S. at 257-58.

Additionally, individuals are subject to the same contribution limits as PACs. MCA § 13-37-216(1) & (3). Imposing the same limit on PACs as individuals seriously undermines individual contributors' ability to associate. Individual contributors who would give money to a PAC for the purpose of having that PAC support whatever candidates that PAC believes is appropriate are

thwarted in their attempt to meaningfully associate with PACs because of the identically low limits on PACs. *See Randall,* 548 U.S. at 257-58.

The Commission argues that "political party contribution limits are significantly greater" than those of individuals or PACs. (Appellants' Mot. Stay at 15.) And PACs and political parties can provide personal services to a candidate, so contribution limits are not diluted. (*Id.*) (*citing Randall*, 548 U.S. at 257-58). But the practical effect of the $800 aggregate contribution limit is to trivialize association with political parties by in effect allowing only 5 of the 51 GOP central committees in Montana to give on par with an individual or PAC to any one candidate, or each party to give to each candidate $15.69. This trivialization crosses party lines. As Mary Baker testified, over 120 political party committees exist in Montana. That any one of these 120 committees can instead choose to contribute unlimited amounts to fund campaign staff for a candidate and get entangled in a campaign they are not running nor have an interest in running (and which candidates would probably rather they not run) does not negate the fact that when political parties engage in the speech they wish to engage in by making contributions to candidates, the contribution limits imposed on them undermine the value of associating with Montana's political parties. *See Randall*, 548 U.S. at

257-58.

c. The Contribution Limits are Nor Properly Indexed for Inflation.

The contribution limits are to be adjusted for inflation using the consumer price index. MCA § 13-37-216(4). The last time the contribution limits were raised was in 2008. This is because the Consumer Price Index has not increased since then. But as Rep. Miller testified, since 2008, the cost of yard signs has risen 8%, the cost of pencils has risen 15%, the cost of postage 10%, and the cost of gas 60%. These increased costs are not reflected in the Consumer Price Index. The Consumer Price Index is not a sufficient index to reflect a candidate's campaign needs, and so an already low contribution amount "inevitably becomes too low over time." *Randall*, 548 U.S. at 261. Lacking proper inflation monitoring, the limits are too low.

The Commission argues that use of the Consumer Price Index adjustment for inflation is "standard" for contribution limits. (Appellants' Mot. Stay at 16.) Being the standard means of accounting for inflation does not make it sufficient. The concern expressed in *Randall* was that the limits imposed "inevitably become[] too low over time." *Randall*, 548 U.S. at 261. Given Rep. Miller's testimony regarding the substantial increases in campaign expenses since 2008,

Montana's limits are not sufficiently keeping up with inflation and so are too low.

d. The Individual Contribution Limits Lack A Special Justification.

Montana might be able to overcome an unconstitutionally low contribution limit by demonstrating a "special" justification beyond that which is normally required to sustain contribution limits. *Randall*, 548 U.S. at 261. Notably, the *Eddleman* decision shows no factual evidence of corruption its appearance. The only evidence was a vague statement that contributions "get results." *Eddleman,* 343 F.3d at 1093. Ms. Baker, however, testified that $1,000 in Montana is not a large contribution and presents no contribution problem and that there is no evidence of quid pro quo corruption in Montana at that level. Given that such a comparatively large amount poses no risk of corruption, limits of $160 cannot possibly be assert to prevent a unique concern for corruption in Montana. The contribution limits already fail to serve any quid-pro-quo corruption interest.

The Commission appears to contend that Montana can offer a special justificationfor its low limits: Montana is an inexpensive place to campaign. (Appellants' Mot. Stay at 16.) Even if this was a "special justification" within the meaning of *Randall*, *see Randall*, 548 U.S. at 261, the evidence contradicts it. Rep. Miller testified to regarding campaign expenses and how many of his targeted

voters he must choose to ignore suggests that Montana is not so inexpensive as to make $160 and $800 contribution limits adequate. Additionally, as Jim Brown testified, House District 72 in Beaverhead County is 5500 square miles, requiring substantial time and gas to traverse. Rick Breckenridge testified that gas prices are higher in Montana than elsewhere, and that the rural nature of Montana's population imposes more travel and thus greater costs. And Montana's reservations, with their unique advertising requirements, impose additional costs for those whose district includes them. All of these facts impose greater expenses on Montana's candidates.

e. The Contribution Limits Are Not Proportionate to the Averted Harm.

With almost all factors implicated, this Court must look carefully at the record to determine whether the restriction on First Amendment rights is proportionate to the harm it is preventing. *Randall,* 548 U.S. at 249. It is not. While contribution limits as a general matter can prevent quid pro quo corruption resulting from large contributions, *see Buckley*, 424 U.S. at 26, Ms. Baker testified that, as a practical matter, $1000 contributions have shown no risk of corruption in Montana. In fact, in her eleven years of working at the Office of Political Practices, she knew of no candidate that could be corrupted by a

contribution of $2500 or less. Yet as Rep. Miller testified, Montana's contribution limits—all well under $1000—in some cases barely cover a tank of gasoline to knock on doors in many districts and force candidates to choose which voters to reach. Political parties voices are "reduced to a whisper," *Randall,* 548 U.S. at 259, with political parties never contributing greater than 4.2% of all candidate contributions between the years 2000-2010. (Trial Ex. 24.) And this reality imposes even greater burdens on challengers, who in all years since 2000 except 2006 received more contributions from political parties than incumbents. (Trial Ex. 25.) Thus the burdens candidates face because of Montana's contribution limits are wildly disproportionate to the nonexistent anticorruption harm they are purported to prevent. The Commission nowhere disputes this disproportionality.

The contribution limits are not tailored to any cognizable interest. They are unconstitutionally too low. Thus, the Commission cannot show any likelihood of success on the merits.

B. The Commission Will Not Suffer Substantial Harm If a Stay is Denied.

The Commission contends that the district court's injunction provides "no guidance for Appellants, or to candidates, political committees, or individuals who may wish to express their political speech through contributions in the next

month." (Appellants' Mot. Stay at 19.) It is hard to imagine what further guidance Appellants or Montanans need remedy any purported confusion they have regarding the district court's injunction is needed. The district court expressly states that the individual contribution limits, the PAC contribution limits, and the aggregate political party contribution limits of Section 13-37-216 have been lifted. (Doc. 159, at 5.) PAC aggregate contribution limits remain in force. (Doc. 159, at 4 n. 1.)

The district court's injunction does not harm Appellants. Attorney General Bullock can benefit from the injunction since he, as a gubernatorial candidate, would be allowed to accept greater contributions from his political party and other contributors along with all other state-level candidates. And the injunction relieves the Commission on Political Practices of the burden of monitoring and enforcing compliance with contribution limits that it acknowledged in testimony before the district court has no impact on corruption. The Commission suffers no harm from the district court's injunction.

C. Issuance of a Stay Will Substantially Harm Other Parties Interested in the Proceeding.

The same cannot be said of Appellees Doug Lair, Steven Dogiakos, the Beaverhead County Republican Central Committee, and the Lake County

Republican Central Committee, nor of any other potential contributors in the state of Montana. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Sammartano v. First Judicial Dist. Court, in & for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002). Staying the injunction to allow an unconstitutionally low contribution limit to be in force during a campaign cycle—a time where interest in engaging in the political debate is at its peak and a time when their contributions may matter most—irreparably burdens and chills their First Amendment freedoms.

Indeed, the United States Supreme Court in *FEC v. Wisconsin Right to Life,* 551 U.S. 449 (2007) has said that the fact that an ad is run near an election does not mean it is regulable. *Id.* at 472 ("If this were enough to prove that an ad is the functional equivalent of express advocacy, then [the electioneering-communication prohibition] would be constitutional in all of its applications."). And in *Citizens United v. FEC*, 130 S.Ct. 876 (2010), the Court recognized that challenges to campaign-finance laws would, by their nature, be brought near elections:

> It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short

> timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others.

Id. at 895. These principles show that the fact that a challenge is brought near an election has no bearing on whether the challenged provision is likely unconstitutional and, therefore, no bearing on whether an injunction should issue. *See Randall,* 548 U.S. 230 (striking down Vermont's contribution limits the summer before gubernatorial and legislative elections occurred and before Vermont's biennial 2007 legislative session could convene to consider new contribution limits). That a challenge is brought and resolved near an election may not be held against a plaintiff because that is naturally when such challenges arise. And every effort should be made to promote robust public debate on issues of the day.

The Commission's argument that voting has already begun, (Appellants' Mot. Stay at 3, n. 1), and that the injunction drastically alters the status quo (Appellants' Mot. Stay at 19), thus offers little to justify enforcing a constitutionally infirm law that undermines at the most relevant juncture a fundamentally cherished right: involvement in the political debate. Enjoining Section 13-37-216 has no bearing on the content of Montana's ballots, and the

Commission makes no showing that any completed military ballots have even been returned. And maintaining the status quo is not part of the stay analysis:

> [T]he Supreme Court in *Hilton* did not include preservation of the status quo among the "factors regulating the issuance of a stay." *See* 481 U.S. at 776, 107 S.Ct. 2113; *see also Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir.1998). Rather, the Court recognized that "the traditional stay factors contemplate individualized judgments in each case, [and] the formula cannot be reduced to a set of rigid rules." *Hilton*, 481 U.S. at 777, 107 S.Ct. 2113. Maintaining the status quo is not a talisman. . . . If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury. . . . The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.

Golden Gate Rest. Ass'n v. City & County of San Francisco, 512 F.3d 1112, 1116 (9th Cir. 2008) (some citations omitted).

Weighing the the certainty that the Contributors and other contributors have and will continue to suffer irreparable harm—particularly since the Commission is threatening possible prosecution against those currently acting under the protection of the district court's permanent injunction of the limits—against some vague and unsubstantiated possibility of candidates and voters being irreparably harmed, the injunction should remain in force. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (finding that "the Ninth Circuit's 'possibility' standard is too lenient . . .").

D. The Injunction Serves The Public's Interest.

The Commission claims but does not show how a stay will cause confusion and "undermine the integrity of Montana's electoral process." (Appellants' Mot. Stay at 20.) The Commission must *prove* its interests, that is, that the public interest would be served by staying the injunction because a 'wild west' scenario is likely to ensue. The government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (internal citation omitted).

Moreover, the public's interest lies in having the Constitution upheld: there is "significant public interest in upholding First Amendment principles." *Sammartano*, 303 F.3d at 974 (collecting cases from among the circuits to demonstrate the uniformity of this view). Lacking proof of some substantial, countervailing interest to justify subverting First Amendment rights, the Commission does not satisfy this factor, nor the requirements of Circuit Rule 27-3(a), which require a showing of irreparable harm to the moving party.

Conclusion

The Commission has not satisfied any of the factors it must prove to justify staying the district court's injunction of Montana Statute Section 13-37-216. This Court should deny the Commission's Motion for Stay Pending Appeal.

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Respectfully submitted,

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Certificate of Service

I hereby certify that the foregoing document was served electronically on October 9, 2012, upon the following counsel of record via the Ninth Circuit's electronic filing system:

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